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83-1993

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN E. LANE,
PETITIONER,

v.

UNITED STATES OF AMERICA
DONALD REGAN, SECRETARY OF THE TREASURY,
CHARLES BRENNAN, NO. ATL. REG. COMM. OF I.R.S.,
JOSEPH CLOONAN, Dir. I.R.S. Center, Andover, Mass.,
RICHARD NEZUH, Chief Est. & Gift Tax Div. No. Atl. Reg.,
SIDNEY MARGOLIN, Appeals Officer, No. Atl. Reg.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

1. Whether in deciding that the district court did not have jurisdiction to award attorney fees, the court of appeals relied upon—indeed cited—the decision of the district court in the underlying action—which decision, the court of appeals had, itself, vacated?

2. Whether the court of appeals misapprehended that a decision on the applicability *vel non* of the anti-injunction statute, although phrase in terms of jurisdiction, constitute a decision on the merits; and, correlatively, a decision on the merits is a decision in respect to jurisdiction?

3. Whether in holding that the district court's application of the anti-injunction statute withdrew or otherwise impaired the district court's 1331 general question jurisdiction in respect to post-judgment matters (e.g. an award of attorney fees), the court of appeals decided the matter in a way in conflict with fundamental principles of federal jurisdiction developed by this court?

4. Whether granting the writ in this case will allow the court to review and further clarify basic conceptual and terminological issues in respect to the relationship between "preclusion-of-review statutes" and the now fully granted federal question jurisdiction—which issues have not been, but should be, settled by this court?

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Constitututional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition	5
I. In Deciding That the District Court Did Not Have Jurisdiction To Award Attorney Fees, the Court of Appeals Relied Upon—Indeed Cited—the Decision of the District Court in the Underlying Action—Which Decision, the Court of Appeals Had, Itself, Vacated	5
II. The Court of Appeals Misapprehended That a Decision on the Applicability *vel non* of the Anti-Injunction Statute, Although Phrased in Terms of Jurisdiction, Constitutes a Decision on the Merits; and, Correlatively, a Decision on the Merits Is a Decision in Respect to Jurisdiction	7
III. In Holding that the District Court's Application of the Anti-Injunction Statute Withdrew or Otherwise Impaired the District Court's § 1332 General Question Jurisdiction in Respect to Post Judgment Matters (e.g., an Award of Attorney Fees), the Court of Appeals Decided the Matter in a Way in Conflict With Fundamental Principles of Federal Jurisdiction Developed by This Court	8
IV. Granting the Writ in This Case Will Allow the Court To Review and Further Clarify the Basic Conceptual and Terminological Issues in Respect to the Relationship Between "Preclu-	

Page

sion-of-Review Statutes" and the Now Fully Granted Federal Question Jurisdiction—Which Issues Have Not Been, But Should Be, Settled by This Court 12

Conclusion 13

Appendix A, Opinion of the Court of Appeals—Attorney Fees A-1

Appendix B, Denial of Rehearing, etc. of 8 March 1984 A-7

Appendix C, Opinion of the District Court—Attorney Fees A-8

Appendix D, Opinion of the District Court—Underlying Action A-12

Appendix E, Orders of the Court of Appeals—Underlying Action A-17

TABLE OF AUTHORITIES

Cases

Califano v. *Sanders*, 430 U.S. 98 (1977) 9, 12

Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U.S. 371 (1940) 11

Commissioner v. *Shapiro*, 424 U.S. 614 (1976) 5

Crowell v. *Mader*, 444 U.S. 505 (1980) 4

Enoch v. *Williams Packing Co.*, 370 U.S. 1 (1962) 4, 7

Georgia R. Co. v. *Redwine*, 342 U.S. 299 (1953) 5

Marbury v. *Madison*, 1 Cranch. 137, 2 L.Ed. 135 (U.S. 1803) 9

Nadeau v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978) 4

Noble v. *Union River Logging Railroad*, 147 U.S. 165 (1892) 11

Parrish v. *Loeb*, 558 F. Supp. 921 (Cen. D. Ill. 1982) 6

State of South Carolina v. *Regan*, 52 U.S.L.W. 4232 (Feb. 22, 1984) 4

Swift and Co. v. *United States*, 276 U.S. 311, 326 (1927) 12

The Fair v. *Kohler Die Co.*, 228 U.S. 22 (1913) 11

United States v. *United Mine Workers*, 330 U.S. 258, 288-295 (1947) 11

Constitutional and Statutory Provisions

	Page
United States Constitution, Article III	2, 8
26 U.S.C. § 6166	3,4
§ 7421(a)	3
28 U.S.C. § 1331	2, 4, 5, 8, 10
§ 2412(d)(1)(A)	2, 3

Miscellaneous

Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362 (1953), *reprinted in* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHLER, HART & WECHLER'S *The Federal Courts and the Federal System* 330 (2d ed. 1973) Part G-1, "Relief Under General Jurisdiction," pp. 348-356 and Part G-2, "In Default of Grants of General Jurisdiction," pp. 356-360. Also the 1981 Supplement to the main volume, pp. 104-106 9

RESTATEMENT (SECOND) OF JUDGMENTS 11 and Comments (1980) 12

Sager, *The Supreme Court 1980 Term, Foreward: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) 9

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CHARLES BRENNAN, No. ATL. REG. COMM. OF I.R.S.,
JOSEPH CLOONAN, Dir. I.R.S. Center, Andover, Mass.,
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SIDNEY MARGOLIN, Appeals Officer, No. Atl. Reg.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, John E. Lane [hereinafter "Lane"], respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on 8 February 1984.

Opinions Below

The opinion of the Court of Appeals [Appendix A], is reported at 727 F.2d 18 (8 Feb. 1984). The Court denied Lane's petition for rehearing and suggestion for rehearing *en banc* on 8 March 1984. A copy of the order is attached as Appendix B. The opinion of the district court of 9 June 1983 is not reported. A copy of the opinion is attached as Appendix C.

The above-mentioned opinions are determinations in respect to petitioner's application for attorney fees. In respect to the underlying litigation, the unreported opinion of the district court of 20 May 1982 is attached as Appendix D; and the two unreported orders of the Court of Appeals in respect to the appeal of the underlying case are attached as Appendix E.

Jurisdiction

The judgment of the Court of Appeals [Appendix A] was entered on 8 February 1984. Lane's petition for rehearing and suggestion for rehearing *en banc* was denied on 8 March 1984 [Appendix B]. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

1. Article III, section 2 of the United States Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made...

2. 28 U.S.C. §1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or Treaties of the United States.

3. 28 U.S.C.§ 2412(d)(1)(A), the Equal Access to Justice Act, provides in relevant part:

[A] Court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified . . . .

4. 26 U.S.C. § 7421(a) provides in relevant part:
[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . .

Statement of the Case

In its present posture this case is an application for attorney fees under the "Equal Access to Justice Act" [hereinafter EAJA], 28 U.S.C. § 2412. The district court has made findings that Lane prevailed in the underlying litigation, and that the government failed to show that its position was substantially justified. But it denied the fees on the basis of its further ruling that it lacked jurisdiction. In ruling that it lacked jurisdiction it cited its decision in the underlying action that the court of appeals had previously vacated. [Appendix C] The Court of Appeals affirmed the denial of the attorney fees. It also relied on the district court's decision in the underlying action that it had previously vacated. [Appendix A]

The Underlying Action

John E. Lane, as representative of the estate of G. Kendrick Strong, filed a federal estate tax return with a notice of election to pay the tax due in installments in accordance with 26 U.S.C. § 6166. [Appendix 12-13] The I.R.S. denied the election. After exhausting appeals within the agency, Lane brought suit in the United States District Court against the United States, the Secretary of the Treasury and other Internal Revenue Officials asking for equitable relief in the nature of mandamus to prevent the individual defendants from inter-

fering with Lane's § 6166 election. Lane alleged § 1331 federal question jurisdiction and further alleged that the anti-injunction statute did not apply because his case fell within the recognized exception to the statute, i.e., "under no circumstances could the Government ultimately prevail. . .[and] equity jurisdiction otherwise exists."[1] The district court disagreed. It held the anti-injunction statute applied and dismissed the case. [Appendix D] Lane appealed.

After Lane filed the appendix and the brief, and after seeking and obtaining two extensions of time to file its brief, the I.R.S. conceded the case and moved to dismiss it as moot.

Lane filed opposition to the I.R.S. motion to dismiss the appeal. The Court of Appeals ruled,

> As the government has now approved plaintiff's application for qualification under 26 U.S.C. § 6166, the issues plaintiff seeks to litigate on appeal are moot. Accordingly, the judgment of the district court is vacated and the case is remanded without prejudice to any application plaintiff may submit to the district court under 28 U.S.C. § 2412(d) for attorneys' fees. See *Crowell* v. *Mader*, 444 U.S. 505 (1980). We express no opinion whether attorney fees are warranted under 28 U.S.C. § 2412(d). *Cf.*, *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279-281 (1st Cir. 1978). [Appendix E]

Lane petitioned for rehearing and *en banc* determination. In a second order the Court of Appeals stated:

> [T]he petition is without merit. The judgment of the district court was vacated by our October 29, 1982 order,

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[1] *Enoch* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962). The most recent anti-injunction case to come before the court is *State of South Carolina* v. *Regan*, 52 U.S.L.W. 4232 (Feb. 22, 1984). The parties agreed there was no tax court jurisdiction. Nor could Lane proceed by refund suit since by selling the business to pay the tax he would lose the right he was seeking. The district court's suggestion that Lane raise his claim as a defense to a collection suit [Appendix 15] is impractical because—leaving aside interest and penalties and temerity—the remedy is not in Lane's hands, and the IRS usually only imposes a lien, then waits. See *Commissioner* v. *Shapiro*, 424 U.S. 614 (1976). *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 303 n.11 (1953).

and a decision on the merits of plaintiff's appeal is not a necessary prerequisite to plaintiff's contemplated application for attorneys' fees. [Appendix E]

The Present Application for Attorney Fees

On the basis of these orders, Lane then applied to the district court for attorney fees. The district court found that Lane was a prevailing party, and that the government's position was not substantially justified. The district court, however, denied attorney fees on the ground that it had no jurisdiction. The district court reasoned that, since its decision in the underlying action was cast in terms of its having "no jurisdiction" because of the anti-injunction statute, it now has no jurisdiction to award attorney fees. The Court of Appeals affirmed using the same reasoning, as well as citing and relying upon the vacated district court opinion in the underlying litigation.

Jurisdiction in the Court of First Instance

The basis for federal jurisdiction in the district court, as is more fully set forth, for both the underlying action and the application for attorney fees under the EAJA, is 28 U.S.C. § 1331.

Reasons for Granting the Petition

I. In Deciding That the District Court Did Not Have Jurisdiction To Award Attorney Fees, the Court of Appeals Relied Upon—Indeed Cited—the Decision of the District Court in the Underlying Action—Which Decision, the Court of Appeals Had, Itself, Vacated.

Departing from the accepted and usual course of judicial proceedings, the Court of Appeals cited and relied upon the district court's opinion in the underlying action as final and dispositive of the jurisdictional issue, even though that decision had been appealed and vacated.

As set out in the Statement of Facts, in the underlying action, after the district court found no jurisdiction, Lane appealed. Shortly before its brief was due the I.R.S. conceded the case and moved to dismiss Lane's appeal. Lane opposed

the motion to dismiss, requesting the Court of Appeals to hear the case. The Court of Appeals refused to hear the case, but rather than dismiss the appeal, the Court of Appeals vacated the district court decision and "remanded without prejudice" the case to the district court for a determination of the attorney fees issue. Lane moved for rehearing and *en banc* hearing of this order, and the Court of Appeals issued a second order, this time unequivocally stating that "a decision on the merits of plaintiff's appeal is not a necessary prerequisite to plaintiff's contemplated application for attorney's fees."

However, despite vacating the district court's decision, and despite the above-mentioned orders, the Court of Appeals allowed the district court to deny attorney fees on the basis of the vacated decision, and in affirming, cited and relied upon that vacated decision. E.g., in the concluding paragraph of its decision [Appendix A-6] the Court of Appeals cites and relies upon the district court's opinion as the basis of its own holding:

> But it is precisely because of that jurisdictional prohibition that the court necessarily did not have jurisdiction, finding, as it did, that Lane's complaint did not fall within the *Williams Packing* exception.

If the Court of Appeals had second thoughts about its orders vacating the underlying decision of the district court, it could have heard and decided the appeal from the underlying action as requested by Lane. But, having declined to hear that appeal, and having vacated that decision, the Court of Appeals may not here rely upon it as final and dispositive.[2]

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[2] The I.R.S. relied upon the underlying decision in *Parrish* v. *Loeb*, 558 F. Supp. 921, 925 n. 4 (Cen. D. Ill. 1982). That court in its decision stated

> Moreover, information now available raises a question whether *Lane* should be viewed as having any weight. The court is now advised that the I.R.S. has reversed its ruling disallowing the election, and that it has filed a motion with the Court of Appeals which has the effect of rendering that appeal moot.

II. THE COURT OF APPEALS MISAPPREHENDED THAT A DECISION ON THE APPLICABILITY *vel non* OF THE ANTI-INJUNCTION STATUTE, ALTHOUGH PHRASED IN TERMS OF JURISDICTION, IS A DECISION ON THE MERITS; AND, CORRELATIVELY, A DECISION ON THE MERITS CONSTITUTES A DECISION IN RESPECT TO JURISDICTION.

The judicially-created exception to the anti-injunction statute is black letter law. The two-pronged test, as phrased in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 82 (1962), is set forth in the Court of Appeals' opinion. [Appendix A-3]:

> [I]f it is clear that under no circumstances could the Government ultimately prevail,...and...if equity jurisdiction otherwise exists,...then the bar of section 7421(a) is inapplicable. However, '[o]nly if it is...apparent [at the time the action is commenced] that under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise the District Court is without jurisdiction....

Since one of the prongs of the injunction *vel non* test is the determination that the government cannot prevail on the merits, a decision either for or against the issuance of an injunction encompasses a determination on the merits of the case, even though a court's ultimate conclusion is shorthanded as jurisdiction or no jurisdiction. And, in fact, such a case, as was true here, is appealed in this posture: was the district court correct in its findings on the merits that there exists a set of circumstances where the Government could ultimately prevail?

The Court of Appeals, however, did not proceed on the basis that the lower court decision in respect to jurisdiction also encompassed a decision on the merits. As it states in the

concluding paragraphs of its decision, it presupposed that this was a two-step case: (1) determine jurisdiction, (2) determine merits:

> But for the interdiction of the anti-injunction statute, it is arguable that the district court would have had jurisdiction to reach the merits of Lane's complaint.

The failure of the Court of Appeals to realize that the district court had, in fact, already adjudicated the underlying action on the merits led the court to misphrase the ultimate issue in respect to the award of attorney fees, i.e., how the word "jurisdiction" is used in the Equal Access to Justice Act:

> But all of this begs the question which, we believe, the plain language of section 2412(d)(1)(A) implicitly asks: whether the district court had the power ultimately to decide the merits of the underlying action. [Appendix A-5]

The fact of the matter is that the district court did decide the merits of the underlying action, and if it had the power (jurisdiction) to decide the merits of the underlying action, it had the power to rule on an award of attorney fees.

III. In Holding That the District Court's Application of the Anti-Injunction Statute Withdrew or Otherwise Impaired the District Court's § 1331 General Question Jurisdiction in Respect to Post-Judgment Matters (e.g., An Award of Attorney Fees), the Court of Appeals Decided the Matter in a Way in Conflict With Fundamental Principles of Federal Jurisdiction Developed by This Court.

By virtue of 28 U.S.C. § 1331 Congress conferred on the federal courts the Article III, section 2 grant of federal question jurisdiction of the United States Constitution. Thus, the lower federal courts have jurisdiction to hear "civil actions

arising under the Constitution [and] laws...of the United States," including those laws which regulate and limit their jurisdiction (such as the anti-injunction statute), and concomitant constitutional issues involving the application of a law regulating jurisdiction. This is fundamental. In *Marbury* v. *Madison*, 1 Cranch 137, 173-74; 2 L.Ed. 135, 171 (U.S. 1803), before undertaking to decide that the section of the Judiciary Act conferring jurisdiction on the Supreme Court to issue writs of mandamus was unconstitutional, Chief Justice Marshall set forth from whence cometh his power to decide the question:

> The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed [to have the Supreme Court issue the writ] is given by a law of the United States.[3]

That the federal courts have general federal question jurisdiction to inquire into the application and validity of laws limiting their jurisdiction is so well established that the court seldom bothers anymore to recite the proposition. For instance in *Califano* v. *Sanders*, 430 U.S. 98, 105 (1977) the proposition

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[3] See also Sager, *The Supreme Court 1980 Term, Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981), particularly part I, "Basic Concepts of Federal Subject-Matter Jurisdiction," 22-30 [citing *Marbury* v. *Madison*, at 26]; Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: an Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953), *reprinted in* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHLER, HART AND WECHLER'S, *The Federal Courts and the Federal System* 330 (2d ed. 1973), particularly part G-1, "Relief Under General Jurisdiction," 348-356 and part G-2, "In Default of Grants of General Jurisdiction," 356-360. See also the 1981 Supplement to the main volume, pp. 104-106.

is assumed, even though the case involved an action against the Secretary of Health, Education, and Welfare in the face of a statute saying, "No action against...the Secretary...shall be brought under [§ 1331 *et seq.*]..."

Against this background of basic proposition, the question posed by this case highlights: What happens to the federal question jurisdiction of a federal court after it decides that a statute limiting its jurisdiction is applicable and it dismisses the case?

The Court of Appeals decided that the application of the anti-injunction statute, somehow, *ab initio* or otherwise, withdraws or demeans the § 1331 federal question jurisdiction pursuant to which the district court originally decided the case, thus disabling the district court from determining post-judgment issues such as: if the government concedes pending appeal, may the district court award attorney fees? Stated another way, the reasoning of the Court of Appeals, in effect, goes, if the district court applies the anti-injunction statute, the § 1331 jurisdiction that gave it the power to hear the case to see if the statute applied or not diminishes into an inferior type of jurisdiction, such that the court is impaired from acting in a post-judgment context—in much the same way that the act of stinging fatally disables the stinging bee. For purposes of its opinion the Court of Appeals labels this impaired type of jurisdiction, "jurisdiction to determine jurisdiction," characterizes it as "a far-ranging concept," [Appendix A-5] and concludes it is not the type of jurisdiction Congress had in mind when it used that word in the EAJA.

This reaoning is not in accord with the decisions of this court. The federal question jurisdiction that allowed the court to decide the applicability of the jurisdiction limiting statute does not degenerate into an inferior type of jurisdiction, nor does it change, transform, disappear, metamorphose. Rather it remains, waiting patiently for the next federal question to come along, i.e., given the government conceded on appeal,

should attorney fees be awarded under the EAJA? The cases most on point, come up in the post judgment setting of a collateral attack on a previously rendered judgment. The matter seems to have been thoroughly laid to rest some time ago: once federal jurisdiction, always federal jurisdiction. So long as the court determined issues in respect to the laws or Constitution of the United States, jurisdiction to resist collateral attack resides with the original judgment. *Noble* v. *Union River Logging Railroad*, 147 U.S. 165 (1892) and cases cited therein. The court in that case conceptualized statutes (other than the grant of federal question jurisdiction), which regulate jurisdiction, as jurisdictional requirements that must be "proved in order to set the machinery of the law in motion" (like the anti-injunction statute) and labeled them "quasi-jurisdictional." In another early case, *The Fair* v. *Kohler Die Co.*, 228 U.S. 22, 25 (1913) Justice Holmes states that if the claim of right under the federal statute is frivolous, the judgment could be collaterally attacked for want of federal jurisdiction, but if the federal claim is substantial, jurisdiction resides with the original judgment irrespective of whether the claim won or lost.

To be sure, some cases have used the phrase "jurisdiction to determine jurisdiction," however, they neither conceptualize it as inferior jurisdiction, nor as "far-ranging" [Appendix A-5]. And there is never any doubt that these courts do refer to the general federal question jurisdiction. For example, in *United States* v. *Mine Workers*, 330 U.S. 258, 288-295 (1947), where the court is asked to set aside a contempt conviction based on an injunction that was later ruled improper, while using the parlance "jurisdiction to determine jurisdiction," the court stated,

> We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown... *Id.* at 294.[4]

[4] See also *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376 (1940) [jurisdiction to sustain collateral attack even where the

IV. Granting the Writ in This Case Will Allow the Court To Review and Further Clarify Basic Conceptual and Terminological Issues in Respect to the Relationship Between "Preclusion-of-Review Statutes" and the Now Fully Granted Federal Question Jurisdiction—Which Issues Have Not Been, But Should Be, Settled by This Court.

The effect that the anti-injunction statute has on the federal question jurisdiction of the federal courts raises categoric issues in respect to how to conceptualize and articulate the effect that "preclusion-of-review statutes," *Califano* v. *Sanders*, 430 U.S. 98, 105 (1977), have on the now, fully granted, federal question jurisdiction. The hyphenated phrase is useful to this practitioner in distinguishing that class of cases where there clearly is federal question jurisdiction except for a statute attempting to eliminate it from that class of cases where the courts are troubled as to whether any federal jurisdiction exists at all. The phrase also seems to be a useful starting point to further clarify this area of federal jurisdiction.

Needless to say, the area is confusing to the non-specialized practitioner. For example, the result of a court's application of a preclusion statute and the result of finding no federal question are both shorthanded to "lack of subject matter jurisdiction," but for purposes of this case each result carries a different consequence. In its section defining and delimiting "subject matter jurisdiction," the Restatement (Second) of Judgments, § 11, Comment e (1980) states in reference to this type of case:

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jurisdictional statute involved in the original case was later declared unconstitutional]; and *Swift and Co.* v. *United States*, 276 U.S.311, 326 (1927) [The court refused to vacate a consent decree on the grounds that when the decree was entered there was no case or controversy within the meaning of Article III: "The [rendering] court had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and the parties."]

> The problem [of defining and delimiting subject matter jurisdiction] can be particularly difficult when the issue determining subject matter jurisdiction parallels an issue going to the merits; . . . .

In short, it does not seem fair that Lane should be a prevailing party, that the government's position should be unjustified (especially where Lane undertook to prove that "under no circumstances could the government prevail"); but that he lose out on attorney fees because of conceptual and terminological complication in the field of federal jurisdiction.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 1984

Appendix A

United States Court of Appeals
For the First Circuit

No. 83-1524.

JOHN E. LANE, REPRESENTATIVE OF THE ESTATE OF G. KENDRICK STRONG, DECEASED,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

Norman C. Ross, Gloucester, Mass., for plaintiff, appellant.
David English Carmack, Washington, D.C., with whom *Glenn L. Archer, Jr.*, Asst. Atty. Gen., *Michael L. Paup*, *Gary R. Allen*, *Mary L. Fahey*, Attys., Tax Division, Dept. of Justice, Washington, D.C., and *William F. Weld*, U.S. Atty., Boston, Mass., were on brief, for defendants, appellees.

Before COFFIN and BREYER, *Circuit Judges*, and MALETZ,* *Senior Judge*.

Argued Dec. 8, 1983.
Decided Feb. 8, 1984.

MALETZ, Senior Judge.

In 1980 Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, in the belief that certain persons "may be deterred from seeking review of . . . unreasonable governmental action because of the expense involved . . . ," and in the hope of "reduc[ing] the deterrents and disparity by entitling certain prevailing parties to recover an award of

* Of the United States Court of International Trade, sitting by designation.

attorney fees . . . against the United States. . . ." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5-6 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4984.

To that end section 2412(d)(1)(A) of the EAJA allows attorneys' fees and other expenses to be awarded in an action brought by or against the United States, provided that the applicant is a "prevailing party" in a "civil action," and that the position of the United States in the litigation was not "substantially justified."[1] One other condition precedent to a fee award, and the one upon which we focus here, is that the action must be brought in a court "having jurisdiction of that action."

As will be discussed in greater detail, plaintiff-appellant John C. Lane made an application for attorney's fees pursuant to section 2412. In ruling on his application, the district court found that Lane was a prevailing party, and the government had failed to meet its burden of showing that its position was substantially justified. His fee request was nevertheless denied based on the district court's further finding that it lacked jurisdiction over his complaint. For the reasons that follow, we affirm.

I.

Plaintiff Lane, in his capacity as representative of the estate of G. Kendrick Strong, brought an action against the United States and various Internal Revenue Service officials seeking equitable relief in the nature of mandamus. Lane sought to prevent the government from interfering with his election to

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[1] That section provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

pay estate taxes in installments as provided under 26 U.S.C. § 6166 (1976). He alleged jurisdiction under 28 U.S.C. §§ 1331 and 1361 (1976), and 5 U.S.C. § 702 (1976).

The only conceivable basis for jurisdiction which the district court found was under the federal question provision of 28 U.S.C. § 1331. Still, in the face of the tax anti-injunction statute, 26 U.S.C. § 7421(a) (1976), the district court concluded that it lacked jurisdiction and, therefore, dismissed the action.

The anti-injunction statute provides in unequivocal terms that

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

A judicially-created exception to this clear statutory bar to injunctive relief in tax cases was announced in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962). Under that exception, "if it is clear that under no circumstances could the Government ultimately prevail,...and...if equity jurisdiction otherwise exists," *id.* at 7, 82 S.Ct. at 1129, then the bar of section 7421(a) is inapplicable. However, "[o]nly if it is...apparent [at the time the action is commenced] that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed." *Williams Packing Co.*, 370 U.S. at 7, 82 S.Ct. at 1129. *Accord Bob Jones University* v. *Simon*, 416 U.S. 725, 748-49, 94 S.Ct. 2038, 2051-52, 40 L.Ed.2d 496 (1974).

In addressing itself to whether the *Williams Packing* exception was applicable to Lane's complaint, the district court made two findings. First, it found that Lane had failed to show that he was without an adequate remedy at law. The

district court additionally found that in any event Lane had made no showing that the government would certainly lose on the merits. Accordingly, the district court granted the government's motion to dismiss.

Pending an appeal to this court from that dismissal, the government conceded that the Strong estate qualified for section 6166 treatment. In an order dated October 29, 1982, this court dismissed Lane's appeal as moot, vacated the district court's order, and remanded the case without prejudice to any application for attorney's fees. On the question of attorney's fees this court "express[ed] no opinion whether attorney fees are warranted under 28 U.S.C. § 2412(d)." On remand, the district court denied Lane's fee request, for the very reason stated in that court's opinion granting the government's motion to dismiss—it was not a court having jurisdiction over Lane's action.[2] This second appeal followed.

II.

[1] Lane's basic contention is that the word "jurisdiction" contained in the phrase "in any court having jurisdiction of that action" means "jurisdiction to determine jurisdiction." We have combed the legislative history of the EAJA, and find that it sheds no light on this question. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984; H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5003. Given the absence of a clearly expressed legislative intention to the contrary, the plain language of the

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[2] The mere fact that this court remanded "without prejudice" in no wise foreclosed the district court from reaching the same conclusion it had reached previously as to its jurisdiction. Indeed, the district court's order was vacated, not reversed. Lane was permitted to litigate his attorney's fees on remand which is all this court's mandate intended. *See Brunswick Corp.* v. *Chrysler Corp.*, 287 F. Supp. 776 (E.D. Wis. 1968).

In addition, we find Lane's contention that "the EAJA itself established general federal question jurisdiction" to be nothing short of puzzling. We have found no authority for this proposition, nor has Lane offered any.

statute itself must be regarded as conclusive. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

[2] A plain reading of the phrase "jurisdiction of that action" in section 2412(d)(1)(A), in our view, properly refers to subject matter jurisdiction—the power to decide the merits of the underlying action—and not to whether the court had jurisdiction to determine its jurisdiction. Nothing in the language of section 2412 supports Lane's view that the word "jurisdiction" is to be so expansively read. Furthermore, it must be borne in mind that since section 2412 is a limited waiver of sovereign immunity, it is to be narrowly construed and strictly observed. *Rhode Island Committee on Energy* v. *General Services Administration*, 561 F.2d 397, 405 (1st Cir. 1977). If Congress had intended the sweeping result which Lane suggests it could have easily done so by providing, for example, for an award of attorneys' fees "in any court where that action is brought." That Congress did not expressly so provide makes us reluctant to conclude that Congress meant in using the word "jurisdiction" to encompass such a far-ranging concept as "jurisdiction to determine jurisdiction." Adopting the broad interpretation Lane proffers would be patently at odds with a narrow construction of section 2412.

[3] It is, of course, true that every federal court has the inherent power to determine as a preliminary matter its own subject matter jurisdiction. *See United States* v. *United Mine Workers*, 330 U.S. 258, 290-92 & n. 57, 67 S.Ct. 677, 694-95 & n. 57, 91 L.Ed. 884 (1947). But all of this begs the question which, we believe, the plain language of section 2412(d)(1)(A) implicitly asks: whether the district court had the power ultimately to decide the merits of the underlying action.

III.

[4] But for the interdiction of the anti-injunction statute, it is arguable that the district court would have had jurisdiction to reach the merits of Lane's complaint. But it is precisely because of that jurisdictional prohibition that the court necessarily did not have jurisdiction, finding, as it did, that Lane's complaint did not fall within the *Williams Packing* exception. The district court was, therefore, not a court "having jurisdiction of that action" for the purpose of a fee award under 28 U.S.C. § 2412.

All in all, we conclude that the district court was correct in denying Lane's request for attorney's fees.

Affirmed.

Appendix B

United States Court of Appeals
For the First Circuit

No. 83-1524.

JOHN E. LANE, REPRESENTATIVE OF THE ESTATE OF
G. KENDRICK STRONG, DECEASED,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

ORDER OF COURT
Entered March 8, 1984

Upon consideration of "Petition for Rehearing and Suggestion for En Banc Determination" which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to denying the petition for rehearing and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court:
(s) FRANCIS P. SCIGLIANO, *Clerk.*

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 81-2269-Z

JOHN E. LANE, REPRESENTATIVE OF THE ESTATE OF G. KENDRICK STRONG

v.

UNITED STATES OF AMERICA, et al.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This case comes before the court on plaintiff John E. Lane's application for attorney's fees under the Equal Access to Justice Act (the "Act"), 28 U.S.C. §2412. Plaintiff, the executor of the estate of G. Kendrick Strong, incurred the fees in connection with a lawsuit filed September 14, 1981 challenging the Internal Revenue Service's refusal to allow him to pay a certain portion of estate taxes in installments as provided in 26 U.S.C. §6166 ("Section 6166").[1] The complaint sought equitable relief "in the nature of a mandamus" against various governmental officials. On May 20, 1982, I granted the government's motion to dismiss for lack of jurisdiction and plaintiff appealed. Before the case came up for hearing, however, the government conceded that the estate qualified

[1] Section 6166(a)(1) provides: "If the value of an interest in a closely held business which is included in determining the gross estate of a decedent who was (at the time of his death) a citizen or resident of the United States exceeds 65 percent of the adjusted gross estate, the executor may elect to pay part or all of the tax imposed by section 2001 in two or more (but not exceeding 10) equal installments." More than 65 percent of Strong's estate consisted of commercial rental property business. The IRS initially determined, however, that the rental business did not qualify as an interest in a closely held business.

for the installment treatment it had sought under Section 6166. Thereafter, the Court of Appeals for the First Circuit dismissed plaintiff's appeal over his objection and vacated the judgment of this Court on grounds of mootness. The Court then remanded the case "without prejudice" to any application for attorney's fees. Although the Court's brief order virtually invites plaintiff to seek fees and says that a decision on the merits of his appeal is not a prerequisite to his application, I cannot award the fees because this Court, for the reasons earlier spelled out, did not have jurisdiction of the action.

Plaintiff makes his application under 28 U.S.C. §2412(d)(1)(A). That section states that a court shall award to a "prevailing party" attorneys' fees and other expenses incurred by that party in any civil action "brought by or against the United States in any court *having jurisdiction of that action*..." (emphasis supplied). According to the clear language of the statute, I must have jurisdiction of the original action giving rise to the fees for plaintiff to be entitled to them. Absent an expressed legislative intent to the contrary, the wording of the statute should be given its plain, clear and ordinary meaning. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In order to avoid more than one appeal in this case, however, I feel compelled to discuss the government's alternative arguments, none of which are persuasive. First, the United States argues at some length that its position in this case has been reasonable. The Act precludes a fee award if the court finds that "the position of the United States was substantially justified," a phrase which is defined in the legislative history as embodying a reasonableness test. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Adm. News 4953, 4989. At the heart of the government's argument is its contention that the relevant government "position" here is its stance on jurisdiction—clearly a reasonable one in light of this Court's dismissal of the action on

those grounds. However, I do not accept such a narrow definition of the government's "position" for purposes of the fee statute.

Although neither the Act nor legislative history defines the term, the intent of the statute is to remove the economic deterrents which may stand in the way of challenging unreasonable governmental actions. In keeping with that purpose, "the Court must scrutinize not only the government's theory in defending the legal issues raised but also the occurrences that impelled plaintiff to bring this action." *Photo Data, Inc.* v. *Sawyer*, 533 F. Supp. 348, 352 (D.D.C. 1982). Besides, the government's litigation position in this case was not limited to a claim of no jurisdiction. In opposing plaintiff's motion for summary judgment and in support of its own summary judgment motion last year, the government argued that the plaintiff was not entitled to elect the payment deferral provisions of Section 6166. The government has failed to meet its burden of showing *that* position was "substantially justified." In reaching that conclusion, I attach particular significance to the length of time it took the government to investigate plaintiff's claim and then, upon getting all necessary information, to concede that he was entitled to pay by installments.

The government next argues that plaintiff is not the "prevailing party." But in getting the IRS to reverse itself, the plaintiff clearly achieved precisely the benefit he had sought in bringing suit. *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). That plaintiff lost in district court on jurisdiction does not make him the loser for purposes of the act. If the lawsuit acted as a catalyst in prompting defendants to act in his favor, he is entitled to fees even without a formal victory in court. *Fischer* v. *Adams*, 572 F.2d 406, 410 (1st Cir. 1978). It is fair to infer from the sequence of events in this case that plaintiff's suit acted as a spur to the IRS's eventual change of heart.

Finally, the government argues that the estate—the real party in interest—does not meet the Act's definition of a "party" eligible for a fee award. The relevant section limits those entitled to fees to an individual with a net worth of less than one million dollars and a small business or other "association or organization" worth less than five million dollars or which employs under 500 employees. 28 U.S.C. §2412(d)(2)(B).[2] Although an estate is not specifically mentioned, I conclude that the definition is broad enough to include it, particularly when interpreted in light of the statute's overall purpose. The estate itself is small enough to fall within the net worth parameters of the Act, and the IRS's decision which was challenged primarily affected a small business which composes the bulk of the estate. It is precisely these small entities that Congress intended to help in passing the fee-shifting provision.

Unfortunately, however, no help is forthcoming to this particular plaintiff because there was no jurisdiction in the original action. Accordingly, I deny plaintiff's request for attorney's fees.

June 9, 1983

(s) RYA W. ZOBEL
District Judge

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[2] Section 2412(d)(2)(B) states: " 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed,...or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization having not more than 500 employees at the time the civil action was filed...."

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 81-2269-Z

JOHN E. LANE

v.

UNITED STATES OF AMERICA,
DONALD REGAN, Secretary of the Treasury,
CHARLES BRENNAN, No. Atl. Reg. Comm. of I.R.S.,
JOSEPH CLOONAN, Dir., I.R.S. Center, Andover,
RICHARD NEZUH, Chief Est. & Gift Tax Div.,
No. Atl. Region, Boston, Massachusetts,
SIDNEY MARGOLIN, Appeals Officer,
No. Atl. Region, Boston, Massachusetts

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff John E. Lane ("Lane"), Representative of the Estate of G. Kendrick Strong ("Strong") has brought this action against the United States, the Secretary of the Treasury, Donald Regan, and other Internal Revenue Service officials. He seeks equitable relief in the nature of mandamus to prevent the individual defendants from interfering with plaintiff's election to pay estate taxes in installments as provided in 26 U.S.C. §6166, ("§6166"). Plaintiff has moved for summary judgment. Defendants have filed a motion to dismiss or, in the alternative, for summary judgment. The first issue before me is whether or not this Court has jurisdiction to grant the relief sought.

The following facts are undisputed. At the time of his death on December 30, 1979 Strong, a Massachusetts resident, held commercial rental properties on or near Bearskin Neck, Rock-

port, Massachusetts, which he himself managed as a sole proprietorship. He made or contracted for repairs; he marketed his units, collected rents, and kept the books of the business. Plaintiff, as Special Administrator, filed a federal estate tax return on behalf of Strong's estate with a notice of election to pay the tax due in installments in accordance with §6166.* The Internal Revenue Service determined that §6166 was not applicable because Strong's rental business did not qualify as an "interest in a closely held business" within the meaning of §6166(b)(1)(A) as elucidated by Revenue Rulings 75-365, 1975-2 C.B. 471, and 75-367, 1975-2 C.B. 472. Lane thereupon brought this action.

Plaintiff asserts jurisdiction under 28 U.S.C. §1361, the mandamus statute, 5 U.S.C. §702, the Administrative Procedure Act, and the federal question provision, 28 U.S.C. §1331. The mandamus statute is not applicable to this case and neither of the other two statutes provide the Court with subject matter jurisdiction over this controversy.

While the action is cast in terms of a petition for mandamus, the relief requested affects directly the treasury of the United States and not the individual named defendants. This is clearly an action against the United States and 28 U.S.C. §1361 cannot, therefore, serve as a basis for jurisdiction. *Commonwealth of Massachusetts* v. *Connor*, 248 F.Supp. 656 (D. Mass. 1966), aff'd per curiam, 366 F.2d 778 (1st Cir. 1966). "What is in reality an action against the United States cannot be brought within this section by merely recasting it as an action against an officer." *Id.* at 660.

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* §6166(a)(1) provides:

If the value of an interest in a closely held business which is included in determining the gross estate of a decedent who was (at the date of his death) a citizen or resident of the United States exceeds 65 percent of the adjusted gross estate, the executor may elect to pay part or all of the tax imposed by section 2001 in 2 or more (but not exceeding 10) equal installments.

The general grant of federal question jurisdiction, 28 U.S.C. §1331, and the jurisdictional section of the Administrative Procedure Act, 5 U.S.C. §702, are likewise inapposite. In 1976 Congress amended 28 U.S.C. §1331(a) to eliminate the amount in controversy requirement to maintaining an action against the United States, any of its agencies, or any officer of such agency acting in official capacity. The Supreme Court has held that the effect of this modification was to confer jurisdiction on federal courts to review agency action, subject, however, to preclusion-of-review statutes created or retained by Congress. *Califano* v. *Sanders*, 97 S.Ct. 980, 984 (1977). Because of that careful tailoring of the new jurisdictional enactment, the court concluded that the "APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Id.* at 985. The question remains whether jurisdiction under §1331 is precluded in this case by the Anti-Injunction Statute of the Internal Revenue Code, 26 U.S.C. §7421(a).

The language of that statute is unequivocal: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Supreme Court's literal construction of the Anti-Injunction Statute has allowd only two exceptions to the statutory bar to injunctive relief in tax cases: (1) where equity jurisdiction otherwise exists because of the likelihood of irreparable harm to the taxpayer with no adequate remedy at law, and (2) where it is clear that under no circumstances could the government ultimately prevail on the merits. *Enochs* v. *Williams Packing & Navigation Co.*, 82 S.Ct. 1125, 1129 (1962); *Bob Jones University* v. *Simon*, 94 S.Ct. 2038, 2046 (1974).

In his complaint plaintiff has alleged that if the denial of his §6166 election is upheld he will suffer irreparable harm. However, he offers no facts to show the likelihood of such

harm to overcome "judicial reluctance to interfere with the collection of taxes." *White* v. *United States*, 363 F.Supp. 31, 36 (N.D.E.D. Ill. 1973). Not even the loss of a business will necessarily raise a claim to equitable relief. *Williams Packing*, *supra*, 82 S.Ct. at 1129; *Morton* v. *White*, 174 F.Supp. 446, 449 (E.D. Ill. 1959). Here plaintiff invokes §6166 merely to avoid having to liquidate a portion of the estate's real property to pay the estate tax. Moreover, Lane can raise his claim to a §6166 election as a defense to a suit brought by the IRS for collection of the estate taxes due, and is not, therefore, without a remedy at law.

Plaintiff also fails to satisfy the second requirement of *Enochs*. He cannot show that the government will certainly lose on the merits. Apparently conceding that Rev. Rulings 75-365 and 75-367 bar plaintiff's election under §6166, he attacks the Rulings as indefensible under accepted concepts of economics and as illogical. Even if the charge is well founded, as to which I make no judgments, I cannot find that the Rulings are invalid as a matter of law. The Rulings focus on the distinction between the running of a business and the management of investment assets. They are thus reasonably related to the purpose of §6166—to prevent the destruction of an ongoing active business enterprise. While a tax regulation or revenue ruling "may not be sustained if it is 'unreasonable and plainly inconsistent with the revenue statutes'. . . . unless the regulation or ruling is unreasonable and inconsistent in that respect, it is to be sustained; it is not to be overruled 'except for weighty reasons.' " *Harper Oil Company* v. *United States*, 425 F.2d 1335, 1343 (10th Cir. 1970) (citing *Commissioner of Int. Rev.* v. *South Texas Lumber Co.*, 68 S.Ct. 695 (1948), and *Bingler* v. *Johnson*, 89 S.Ct. 1439 (1969)). In addition, Congress in the 1976 Tax Reform Act could have overridden those rulings but chose not to. On the contrary, the legislative history of the Act shows that it "generally retains the definition of existing law relating to an interest in a closely held

business." H.R. Rep. No. 94-1380, 94th Cong.; 2nd Sess. p. 32, reprinted in [1976] U.S. Code Cong. & Ad. News, p. 3386.

Accordingly, plaintiff's motion for summary judgment is denied. Defendant's motion to dismiss for lack of jurisdiction is allowed. Judgment may be entered dismissing the complaint.

May 20, 1982

(s) Rya W. Zobel
District Judge

Appendix E — MANDATE

United States Court of Appeals
For the First Circuit

No. 82-1507.

JOHN E. LANE, AS THE REPRESENTATIVE OF THE ESTATE OF G. KENDRICK STRONG, DECEDENT,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

BEFORE COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

ORDER OF COURT
Entered October 29, 1982

As the government has now approved plaintiff's application for qualification under 26 U.S.C. § 6166, the issues plaintiff seeks to litigate on appeal are moot. Accordingly, the judgment of the district court is vacated and the case is remanded without prejudice to any application plaintiff may submit to the district court under 28 U.S.C. § 2412(d) for attorneys fees. *See Crowell* v. *Mader*, 444 U.S. 505 (1980). We express no opinion whether attorney fees are warranted under 28 U.S.C. § 2412(d). *Cf.*, *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279, 281 (1st Cir. 1978).

By the Court:
(s) DANA H. GALLUP, *Clerk*

Costs in favor of appellant are taxed at $168.00

CERTIFIED AND ISSUED AS INFORMAL MANDATE UNDER F.R.A.P. 41 ON DEC. 02 1982
(s) DANA H. GALLUP, *Clerk*.

By (s) FRANCIS P. SCIAGLIANO, *Chief Deputy Clerk*.

[cc. Messrs. Ross, Archer and Paup]

Exhibit "A"

United States Court of Appeals
For the First Circuit

No. 82-1507.

JOHN E. LANE, AS THE REPRESENTATIVE OF THE ESTATE OF G. KENDRICK STRONG, DECEDENT,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

BEFORE COFFIN, *Chief Judge*,
CAMPBELL, BOWNES and BREYER, *Circuit Judges*.

MEMORANDUM AND ORDER
Entered November 24, 1982

Apart from the fact that plaintiff's petition for rehearing and hearing en banc, received by the Clerk's Office on November 16, 1982, is untimely, *see* Fed.R.Civ.P. 25(a), 35(c), 40(a), the petition is without merit. The judgment of the district court was vacated by our October 29, 1982 order, and a decision on the merits of plaintiff's appeal is not a necessary prerequisite to plaintiff's contemplated application for attorneys' fees. *Cf. Nadeau* v. *Helgemoe*, 581 F.2d 275, 279-80 (1st Cir. 1978). Consequently, leave to file late is granted, and the petition for rehearing and rehearing en banc is denied.

BY THE COURT,
(s) DANA H. GALLUP, *Clerk*.